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## CITATIONS

IN THE

# Supreme Court of the United States

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OCTOBER TERM 1966

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No. 1133

FEDERAL POWER COMMISSION,
*Petitioner,*

v.

SUNRAY DX OIL COMPANY, *et al.*,
*Respondents.*

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No. 1134

THE UNITED GAS IMPROVEMENT COMPANY,
*Petitioner,*

v.

SUNRAY DX OIL COMPANY, *et al.*,
*Respondents.*

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No. 1135

THE BROOKLYN UNION GAS COMPANY, *et al.*,
*Petitioners,*

v.

FEDERAL POWER COMMISSION, *et al.*,
*Respondents.*

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## BRIEF IN OPPOSITION FOR RESPONDENTS SUNRAY DX OIL COMPANY, TEXACO INC., HUMBLE OIL & REFINING COMPANY, GULF OIL CORPORATION, UNION PRODUCING COMPANY, EDWIN L. COX, AND SOHIO PETROLEUM COMPANY

### Opinions Below

The majority and dissenting opinions of the Court of Appeals for the Tenth Circuit are reported at 370 F. 2d 181 and are reprinted as Appendix A to the Petition filed

by the Solicitor General on behalf of the Federal Power Commission (Commission) in No. 1133. The opinion and order of the Federal Power Commission is reported at 31 F.P.C. 623 and its opinion on rehearing at 31 F.P.C. 1315.

## Jurisdiction

The jurisdictional requisites are adequately set forth in the Petitions.

## Questions Presented[1]

1. May the Commission retroactively order refunds of amounts collected under lawfully issued temporary certificates when, in the exercise of its expertise and pursuant to established policies, it determined both at the time of issuance of such certificate and upon subsequent reconsideration that no refund liability should be imposed?

2. Whether the Commission properly exercised its discretion in refusing to base its "in-line" price determination upon evidence relating solely to *de minimis* volumes of gas moving in interstate commerce?

3. Whether there is substantial evidence in the record to support the "in-line" price determined by the Commission, which it employed as a condition to the grant of permanent certificates to reduce the contract prices proposed by the producer certificate applicants?

## Statute and Regulations Involved

The pertinent provisions of the Natural Gas Act (52 Stat. 821-833, as amended, 15 U.S.C. § 717-717w) are set forth in the Petitions.

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[1] Question No. 1 is raised by the Commission in No. 1133 and also by The United Gas Improvement Company in No. 1134 and The Brooklyn Union Gas Company, *et al.* in No. 1135 (distributors). Question Nos. 2 and 3 are raised only by the distributors.

The Commission's *Statement of General Policy No. 61-1,* 18 CFR 2.56(a), 24 F.P.C. 818 (1960) *(Policy Statement),* established, *inter alia,* an initial rate ceiling of 18¢ per Mcf (thousand cubic feet) for Texas Railroad Commission District No. 4, the area in which the gas involved was produced. The *Policy Statement* provided in pertinent part as follows:

> "This statement establishing rate standards for independent producers of natural gas is issued on our own motion and is based on our experience gained after six years of regulation of independent producers under the Natural Gas Act. By this statement and the appended area price schedules we will set standards for initial and increased rate filings by producers for the sale of natural gas into interstate commerce. These standards will serve as a guide to us and to interested parties in determining whether proposed initial rates should be certificated without a price condition and whether proposed rate changes should be accepted or suspended.
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> * * *
>
> "In arriving at the price levels for the various areas set forth in the appendix to this statement, we have considered all of the relevant facts available to us. Such consideration included cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available markets for the gas. . . .
>
> * * *
>
> "These price levels . . . are for the purpose of guidance and initial action by the Commission and their use will not deprive any party of substantive rights or fix the ultimate justness and reasonableness of any rate level. . . .
>
> "Where a proposed price exceeds the indicated rate level and is therefore conditioned or suspended we will, in determining whether the higher price is justified,

not necessarily consider only the financial requirements of the individual producer proposing the price but will consider all of the above elements relevant to the industry generally in the area concerned. Similar evidence will also be required from purchasers or their customers who object to any of the price levels or any specific price. . . ."

The *Fifth Amendment to Statement of General Policy No. 61-1,* 28 F.P.C. 441 (1962), by which the Commission promulgated a 16¢ initial guideline price in the subject pricing area for contracts executed after August 30, 1962, provided in part that:

". . . We have carefully re-examined the appropriate level of initial ceilings in this district in light of present conditions in the area giving due consideration to the applicable court decisions and the factors set forth in our original statement of policy.[1]

"[1] We there stated that these 'included cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available market for the gas.' "

## Statement

This litigation involves the claimed abuse of discretion of the Commission in determining, after hearing, that certificates of public convenience and necessity should issue at an initial price no higher than 16¢ per Mcf to certain producers for sales of gas from fields in Texas Railroad Commission District No. 4. On September 28, 1960, subsequent to this Court's decision in *Atlantic Refining Company* v. *Public Service Commission of New York,* 360 U.S. 378 (1959) *(CATCO)* and concurrently with the institution of its first Area Rate Proceeding, the Commission, after an extensive review of all factual, economic, and cost evidence

available to it, issued its *Policy Statement.* Therein it advised interested parties that it was establishing certain guideline prices at which it intended to issue certificates of public convenience and necessity in the absence of contrary evidence that such prices were either too high or too low. All of the contracts at issue here were executed subsequent to the issuance of such *Policy Statement,* and it is undisputed that the producers relied upon the findings made by the Commission in its *Policy Statement* in entering into these contracts and in subsequently dedicating their gas to the interstate market.[2]

By separate orders, the Commission granted temporary certificates of public convenience and necessity authorizing these producers to commence the proposed sales prior to its acting on their applications for permanent certification. Certain of these temporary certificates specifically provided that amounts collected thereunder would be subject to possible refund. The temporary certificates placed in issue by distributors contained no refund condition. Thereafter, distributors filed a joint motion seeking, *inter alia,* the imposition of refund conditions upon all temporary certificates which contained no refund condition. The Commission, by its order of February 5, 1963, (J.A. 275-282) denied distributors' motion. The distributors did not seek judicial review of this order.

In its order consolidating for hearing these producers' applications for certificates of public convenience and necessity, the Commission provided (J.A. 199):

> "In such a hearing all of the applicants will have an opportunity to show whether the appropriate price at which they should be permanently certificated should be limited to the 15 cent per Mcf price which we found

[2] See *e.g.,* J.A. 131-135; 155. Cross-examination of all producer witnesses was waived by distributors and the Commission Staff.

to be the in-line price as of September 28, 1960, the 16 cent price which is being adopted as the future area ceiling price for this area, or the 18 cent per Mcf price established on September 28, 1960."

Pursuant to this directive of the Commission, the producers prepared and proffered economic evidence (less than 400 pages in length, including exhibits) which conclusively supported the Commission's *Policy Statement* guideline price of 18¢ per Mcf. This evidence was summarily excluded by the Presiding Examiner on motion by the distributors, and this ruling was affirmed by the Commission. The evidence introduced by the Commission Staff included a comprehensive exhibit listing all relevant sales made in District No. 4 under jurisdictional contracts on file with the Commission. The exhibit disclosed, for the period for which the in-line price was being determined, that:

(1) The average initial price, weighted by volume, was *above* 17.176¢;

(2) 82% of the gas sold was at initial rates of 16¢ *and above;*

(3) 71% of the gas being sold was at initial rates of 17¢ *and above.*

Distributors did not introduce any evidence to support their contention that the subject rates should be certificated at initial prices lower than the Commission's *Policy Statement* guideline levels.

The Commission considered and weighed the record evidence, and found (J.A. 379) that, while it "points in the direction of a higher price," the 16¢ price which it adopted was "the lowest price at which substantial volumes of new gas were sold in interstate commerce" and noted that:

*"Our decision herein draws the line substantially below the average going price for gas in the area* and

> in fact, two cents per Mcf below the Commission's guideline ceiling price prevailing at the time these contracts were executed. . . ."[2a]

The Commission also held that it could legally order retroactive refunds of amounts collected under temporary certificates containing no refund condition.

The Commission's 16¢ initial price determination was appealed by both the producers and distributors. The producers also appealed the Commission's finding that it could order refunds retroactively. The Court of Appeals affirmed the Commission's establishment of the 16¢ per Mcf ceiling price line and held the Commission could not legally order refunds retroactively of amounts collected under temporary certificates containing no refund condition.

## Reasons The Writs Should Be Denied

Both the Commission and the distributors raise the legal issue of whether retroactive refunds can be ordered of amounts collected under temporary certificates containing no refund condition. The reasons why this Court should not review that issue are set forth in the Briefs in Opposition filed by Respondents Sun Oil Company and Lamar Hunt which these producers adopt on this point in order to avoid unnecessary duplication. In addition, the Petitions filed by distributors (Nos. 1134 and 1135) attack the Commission's factual finding, based upon the record below, that permanent certificates should be issued at initial rates no higher than 16¢. This attack raises only the question of whether the Commission's price line finding was based on substantial evidence. It is to this issue that our argument is directed.

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[2a] All emphasis supplied unless otherwise indicated.

**1. There is no important question of Federal Law raised by the distributors' Petitions with respect to the Commission's initial price determinations.**

The Commission's in-line pricing technique was, as all parties admit, an interim technique designed to expedite the determination of producer initial certificate prices prior to the establishment of a just and reasonable rate. Hearings have concluded in the area rate proceeding initiated to establish the just and reasonable rate for gas sold from the subject pricing area. Moreover, there are no in-line proceedings for sales from this area pending before the Commission. In fact, there are no pending in-line proceedings from any area except for one involving a few companies in Oklahoma in which the majority of the parties have already settled. The interim in-line methodology utilized herein is no longer a viable Commission procedure. Therefore, there are no legal principles presented by this case which will significantly affect the Commission's future administration of the Natural Gas Act.

Distributors not only are asking this Court to review a Commission procedure which is of only historical importance, but they have chosen a case in which the Commission was faced with a unique factual situation in applying this procedure. This Court in *United Gas Improvement Company* v. *Callery Properties, Inc.*, 382 U.S. 223 at 227 (1965) *(Callery)* emphasized the importance of establishing the price line at a level where " . . . *substantial* amounts of gas have been certificated . . ." Unlike *Callery*, however, there were not *substantial* amounts of gas permanently certificated from this pricing area under other contemporaneous certificates. Moreover, the Commission found that the permanent certificates which had been issued in the relevant time period were for only a ". . . few isolated and inherently non-

representative sales. . . ." (J.A. 372) The question to be resolved by the Commission here was thus the narrow one, not raised in other in-line proceedings, of how an interim in-line price should be established in the absence, as a point of reference, of contemporaneously issued permanent certificates encompassing substantial volumes of gas. This Court's review of the appropriate application upon these unusual facts of an interim procedure which is no longer being utilized is manifestly not required.

### 2. The price level found by the Commission and approved by the Court of Appeals is not "excessive."

The evidence that these same distributors introduced in the *Texas Gulf Coast Area Rate Proceeding* encompassing the subject pricing area established that the 15¢ price level for which they are here contending is far below the cost level for gas of this vintage. Distributors' witness testified in such proceeding that the average current cost of gas was 16.44¢ per Mcf.[3] The Commission Staff in the same proceeding presented cost studies showing that the average cost of gas of this vintage was 16.8¢ per Mcf. Moreover, and perhaps more importantly, the Commission itself, in its Opinion and Order establishing area rates for sales from the Permian Basin found the average national current cost of gas to be 16.43¢ per Mcf. (34 F.P.C. at 192)

Although we believe these cost estimates developed by the distributors, the Commission Staff, and the Commission are lower than actual current cost levels, it is significant that their presentations have clearly demonstrated that the Commission's 16¢ in-line determination in this proceeding,

[3] Distributors' witnesses have consistently testified in the area rate proceedings that these cost level were experienced by the industry commencing in the late 1950's.

which they are here attacking is too high, has in fact erred on the low side. Equally applicable to these facts is the conclusion expressed by this Court in its Second *Phillips* decision that:

> ". . . The record before us does not paint a picture of the public interest sacrificed on the altar of private profit." (*Wisconsin* v. *Federal Power Commission,* 373 U.S. 294, 312 (1963))

An in-line price of 16¢ per Mcf, which is (1) *below* the cost level of gas of recent vintage as developed by both the distributors and the Commission Staff in the relevant area rate proceeding and (2) *below* the national average of the "recent cost of finding and producing an Mcf of gas" as found by the Commission in its only completed area rate proceeding, should not be slashed ever further as urged by distributors.

**3. The Commission appropriately revised its prior in-line determination to reflect current conditions in the industry.**

There is no legal precedent for the distributors' position that, as a matter of law, the Commission was required to freeze the initial prices at which permanent certificates are issued for an interim period lasting at least ten years, while it attempts to determine the appropriate just and reasonable rates. In the instant proceedings, the Commission revealed the fallacy of the distributors' reasoning:

> "The interveners urge, and the examiner holds, that if 15 cents is 'in-line' for the past and our task is to 'hold the line' the price should remain at 15 cents for any subsequent period. This reasoning ignores the crucial fact that 'the key element in our in-line determination is the time at which the contract in issue was executed.'[32] We do not believe that our task of assur-

ing adequate supplies of gas in interstate commerce at the lowest reasonable price can be adequately discharged by an approach which requires us to shut our eyes to the evidence presented in later proceedings. *A rule of law that would deprive producers of any opportunity to show that the initial prices in the 1950's did not suffice for the 1960's or, conversely, that would deprive consumer groups of an opportunity to show a decline in the price level, is not fair to the producers or in the long-term interest of consumers.* Nor is such a rule even suggested by the decisions of the courts." (footnote omitted; J.A. 372)

This Court in its review of the Commission's in-line pricing technique in *United Gas Improvement Company, et al.* v. *Callery Propertes, Inc.,* 382 U.S. 223 (1965) held at 227:

"... Consumer protection is afforded by keeping the 'in-line' price at the level where substantial amounts of gas have been certificated to enter the market *under other contemporaneous certificates,* no longer subject to judicial review or in any way 'suspect....'"

Decisions in the Court of Appeals in Circuits other than the one considering this case have consistently held current conditions to be relevant in establishing the price line. The Court of Appeals for the Ninth Circuit has specifically rejected an argument by one of the distributors herein strikingly similar to that advanced by it and the other distributors in the instant proceeding. The Ninth Circuit stated:

"As previously indicated, *the price line is intended to reflect current conditions in the industry.* Therefore, comparative prices upon which it is based must be prices under which a substantial amount of natural gas presently moves in interstate commerce. *The limitation urged by UGI could well defeat this objective by restricting the comparison to a small number of contracts under which little gas moves today. It could, in*

*fact, require a rollback to prices having no current relevancy.*[5]"[4] (footnote omitted)

The Commission decision in the instant case to revise its prior in-line determination to reflect current conditions in the industry was consistent with the above precedents and fully supported by the record. Moreover, its consideration, *inter alia,* of its *Policy Statement* guideline levels and trends in temporary certificate initial price was clearly proper. The *Policy Statement* guideline level for this area was based on the Commission's "experience gained after six years of regulation of independent producers" and "all relevant facts available" from "all decided and pending cases" was clearly a proper matter to weigh and consider.[5] Moreover, the Commission correctly found that producers directly relied upon the *Policy Statement* price levels in their contract negotiations in deciding whether to commit gas reserves to the interstate market. (J.A. 377-378) Temporary certificate applications are carefully reviewed by the Commission under established policies and regulations and, temporary certificates, if issued, only allow producers to collect rates at or below the current guideline level. Price, refund and rate increase moratorium conditions are frequently inserted. Moreover, orders issuing temporary

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[4] *United Gas Improvement Co.* v. *Federal Power Commission,* 283 F.2d 817, 824 (CA9, 1960), certiorari denied *sub. nom. Superior Oil Company* v. *United Gas Improvement Company,* 365 U.S. 879 (1961).

[5] The Commission does not contend that the *Policy Statement* price levels constitute a final binding determination on interested parties but only that as the product of Commission expertise they are entitled to be weighed along with other relevant factors. Of particular significance is the fact that the original *Policy Statement* guideline levels have been periodically revised by the Commission as a result of more current factors brought to their attention by distributors and other parties in various pending proceedings. In the subject pricing area the Commission by the *Fifth Amendment* to its *Policy Statement* revised its initial guideline level *prior* to its decision in this case.

certificates have been uniformly held to be reviewable by the courts, thereby giving parties opposed to the Commission's policies with respect to temporaries an avenue of protest.[6] Prices approved by the Commission in its consideration of the issuance of these certificates and the experience gained thereby cannot be fairly characterized as meaningless and irrelevant.[7]

Finally, distributors cannot justifiably complain of the quality of the evidence which the Commission and the courts have held is relevant in an in-line proceeding. The exclusionary rules of evidence applicable to in-line proceedings were originally proposed by distributors. Additional evidence showing industry economic and cost trends was proffered by the producers and excluded upon motion by distributors. Having excluded all evidence except that utilized by the Commission in its decision, distributors now maintain that this Court should hold in effect that the Commission must abdicate to them its responsibility to determine the appropriate initial price required by the public convenience and necessity. This is the inevitable result flowing from distributors' position that the Commission in making its in-line determination may not look to any evidence other than permanent certificates which are not

[6] *Pure Oil Co.* v. *Federal Power Commission*, 292 F.2d 350 (7th Cir. 1961); *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 270 F.2d 404 (10th Cir. 1959).

[7] This proceeding also demonstrates the speciousness of the distributors' claim that the issuance of temporary certificates only benefits producers. If the Commission had not issued temporary certificates during this period, there would have been a delay of from one and one-half to three years before approximately 80% of all gas sold from the subject area under contracts executed during the relevant 23-month period commenced its journey to the interstate consumers. No party to this proceeding asserts that this substantial volume of gas was not in fact required to meet the expanding consumer needs at the time when it commenced to flow under temporary certificates.

being contested by distributors before the Commission or the courts. The Commission, in its opinion below, succinctly stated the result which would follow if the distributors' position were adopted:

> "It is not by chance that with the single above-noted exception the only permanent certificates granted during the period were at prices of 15 cents per Mcf or lower, because all applications for higher prices were opposed by some or all of the interveners herein. If these permanent certificates are to control, then the 'in-line' price for sales representing over seven times the minimal volumes of gas permanently certificated during this period is being determined, *not upon consideration of a hearing record, but by the unreviewable fiat of the interveners. . . .*" (J.A. 370-371)

It cannot be said that the Commission's decision to revise the price line it had set for the 1950's to reflect changing conditions in the 1960's was an abuse of discretion and unlawful.

**4. There is no conflict between decisions.**

Distributors erroneously represent that this case presents a clear conflict with the recent decision by the D. C. Circuit Court of Appeals in *Public Service Comm'n of the State of New York* v. *Federal Power Commission,* Nos. 19797, *et al.* (February 7, 1967), which is reprinted as Appendix C to the Petition in No. 1135. The D. C. Circuit Court of Appeals, however, clearly recognized that the unique factual situation in the instant proceedings was not present in the case before them and stated that the court in the instant case was faced with:

> ". . . a problem very different from ours. There, only 1.39% of the gas sold in the area was permanently certificated. . . . In our case there is a substantial vol-

ume moving under permanent certificates.[70] *We are not reviewing the FPC's method of determining an in-line price when there are no permanently certificated prices available for comparison.*" (Footnote omitted) (Petition in No. 1135, page 28a)

It is thus clear that the decision of the Court below affirming the method developed by the Commission for establishing an in-line price in the unique circumstances where no substantial volumes of gas were being sold under contemporaneously issued permanent certificates can have no effect upon the precedental value of the D. C. Circuit's decision involving entirely different Commission pricing areas and does not in any way lead to a lack of uniformity in the circuits.

## Conclusion

For the foregoing reasons, it is respectfully submitted that the petitions for writ of certiorari should be denied.

Respectfully submitted,

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